**RFS Ecusta, Inc., debtor in possession *and* Langdon M. Cooper Chapter 7 Trustee and Pace International Union, AFL–CIO and its affiliated Local No. 1971.** Cases 11–CA–19727 and 11–CA–20045

August 31, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The General Counsel seeks a default judgment[1] in this case on the ground that the Respondent has failed to file a timely answer to the consolidated complaint. Upon a charge filed by PACE International Union, AFL–CIO and its affiliated Local No. 1971 (collectively, the Union) on November 6, 2002, the General Counsel of the National Labor Relations Board issued a complaint in Case 11–CA–19727 on March 31, 2003,[2] alleging that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to furnish information requested by the Union. The Respondent timely filed an answer admitting in part and denying in part the allegations in the complaint.

Upon a charge, an amended charge, and a second amended charge filed by the Union on July 17, October 31, and November 7, respectively, the General Counsel issued an "Order Consolidating Cases, Consolidated Complaint and Notice of Hearing" in Cases 11–CA–19727 and 11–CA–20045 on November 25. The consolidated complaint repeated the allegations in the original complaint and asserted several new allegations. The Respondent failed to file a timely answer to the consolidated complaint.

By letter dated December 16, the Region notified the Respondent that an answer was overdue and that the General Counsel would file a Motion for Summary Judgment if the Respondent failed to file an answer by December 23. The Respondent failed to file an answer by December 23.

On January 9, 2004, the Respondent, through its bankruptcy trustee, filed a "Response to Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing" (Response), in which the trustee advised the Board that "[t]he Trustee is unable to answer the allegations in this National Labor Relations Board ('NLRB') action." The Response stated that the Respondent had filed for bankruptcy, that the Respondent no longer employed employees, and that no purpose would be served by further proceedings.

On January 21, 2004, the General Counsel filed a Motion for Summary Judgment. On January 23, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent failed to file a response to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The November 25 consolidated complaint affirmatively states that, unless an answer is filed within 14 days of service, all the allegations in the consolidated complaint will be considered admitted. Further, the undisputed allegations in the motion also disclose that the Region, by letter dated December 16, notified the Respondent that, unless an answer to the consolidated complaint was filed by December 23, a Motion for Summary Judgment would be filed.

The Respondent's January 9, 2004 "Response" to the consolidated complaint was untimely; therefore, the Board will consider the consolidated complaint's allegations as admitted, unless the Respondent demonstrates good cause for its tardiness. The Respondent did not respond to the Notice to Show Cause, and therefore has not presented the Board with any justification for its delay in answering the consolidated complaint. In its "Response" to the consolidated complaint, however, the Respondent did contend that it was unable to answer the consolidated complaint because of its bankruptcy. Even assuming that the Respondent was there asserting a justification for its delay in responding to the consolidated complaint, we have repeatedly held that an employer's bankruptcy does not provide good cause for failing to file a timely answer. *Ivaco Steel Processing (New York) LLC*, 341 NLRB No. 47, slip op. at 1 fn. 2 (2004); *OK Toilet & Towel Supply, Inc.*, 339 NLRB No. 142, slip op. at 2 (2003); *M & H Coal Co.*, 317 NLRB 209 (1995); *Sorensen Industries*, 290 NLRB 1132, 1133 (1988). Accordingly, we find that the Respondent has failed to establish good cause.

Because the Respondent has not shown good cause for its failure to file a timely answer to the consolidated complaint, we grant the General Counsel's Motion for

[1] The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the consolidated complaint. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

[2] All dates are in 2003, unless otherwise noted.

Default Judgment, but only in part. As noted above, the Respondent did file a timely answer to the original complaint. The Board will not grant default judgment on an allegation responded to in a timely-filed answer to a complaint even though the respondent later fails to timely answer an amended complaint repeating that allegation, provided that the repeated allegation is "substantively unchanged" from the original.[3]

In this case, the original complaint alleged that the Respondent violated the Act by failing and refusing to furnish relevant information requested by the Union on November 27, 2002. The Respondent filed a timely answer to the original complaint denying that this requested information was relevant or necessary to the Union's performance of its statutory duties.

The consolidated complaint repeated the complaint's allegation that the Respondent failed and refused to furnish the information requested by the Union on November 27, 2002. Unlike the original complaint, however, the consolidated complaint listed the specific information that the Union had requested on that date. We find that this listing did not substantively change the original complaint allegation. Accordingly, because that allegation was timely answered, we shall deny default judgment as to that allegation and we shall sever and remand that portion of the proceeding to the Region for further appropriate action. *Miami Rivet of Puerto Rico*, 307 NLRB 1390, 1391 (1992). As explained below, we also remand for appropriate action the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with employee social security numbers, as requested by the Union in a letter dated July 3.

However, we shall grant default judgment on, and deem admitted, the other 8(a)(5) allegations of paragraphs 12(b) and 13 of the consolidated complaint to which the Respondent failed to file a timely answer.

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Pisgah Forest, North Carolina, has manufactured paper and pulp. From about October 22, 2002, until August 12, 2003, the Respondent was a debtor in possession with full authority to continue its operations and to exercise all powers necessary to administer its business. Since about August 12, 2003, Langdon M. Cooper has been duly designated as the Chapter 7 Trustee of the Respondent, with full authority to continue the Respondent's operations and to exercise all powers necessary to the administration of its business. During the 12-month period preceding the issuance of the consolidated complaint, the Respondent purchased and received at its Pisgah Forest, North Carolina, facility goods and materials valued in excess of $50,000 directly from points outside the State of North Carolina. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that PACE International Union, AFL–CIO and its affiliated Local No. 1971 are labor organizations within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

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| Steven Smith | Chief Financial Officer/Chief Operating Officer/Secretary/ Treasurer |
| Jim McMillian | Company representative |

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including power house and janitorial employees, relief foremen, plant clericals, chauffeurs, and receiving and shipping employees, employed by the Respondent at its Pisgah Forest, North Carolina, location; excluding salaried employees, office clerical employees, professional employees, student employees, part-time cafeteria employees, guards and supervisors as defined in the Act.

At all times since August 1, 2001, and continuing to date, the Union has been the designated exclusive collective-bargaining representative of the unit under Section 9(a) and has been recognized as such by the Respondent.

By letter dated July 3, the Union requested from the Respondent the names, social security numbers, rates of pay, job classifications, and dates of recall or hire of all employees performing bargaining unit work. To date, the Respondent has failed and refused to furnish this in-

[3] *OK Toilet & Towel Supply, Inc.*, supra, 339 NLRB No. 142, slip op. at 2; *Media One Inc.*, 313 NLRB 876, 876 (1994); *TPS/Total Property Services*, 306 NLRB 633, 633 (1992) ("Summary judgment is not proper based on a respondent's failure to answer an amended complaint's allegations that are substantively unchanged from allegations contained in a prior version of the complaint to which the respondent filed a proper denial."); *Caribe Cleaning Services*, 304 NLRB 932 (1991).

formation to the Union. With the exception of employee social security numbers, the information requested by the Union is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.[4]

Since about February 2003, the Respondent, without notice to or bargaining with the Union, unilaterally changed the wages and benefits of its newly-hired and recalled employees.

## CONCLUSIONS OF LAW

1. By failing and refusing to furnish the Union with the names, rates of pay, job classifications, and dates of recall or hire of all employees performing bargaining unit work, as requested by letter dated July 3, the Respondent, RFS Ecusta, Inc., has failed and refused to bargain collectively with the Union, and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By changing the wages and benefits of its newly-hired and recalled employees in the unit without prior notice to the Union and without affording the Union an opportunity to bargain with regard to the changes, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully failed and refused to furnish relevant and necessary information to the Union, we shall require the Respondent to furnish the Union with the names, rates of pay, job classifications, and dates of recall or hire of all employees performing bargaining unit work.

Having found that the Respondent unlawfully changed the wages and benefits of its newly-hired and recalled employees, we shall require the Respondent to restore the status quo by rescinding unilateral changes made without affording the Union an opportunity to bargain regarding the decision to institute these changes. Nothing in our Order, however, should be construed as authorizing or requiring the Respondent to cancel any wage increase and/or increase in benefits without a request from the Union. *Nicholas County Health Care Center*, 331 NLRB 970, 997 fn. 41 (2000); *Royal Motor Sales*, 329 NLRB 760, 784 (1999), enfd. 2 Fed. Appx. 1 (D.C. Cir. 2001). The Respondent must make whole its unit employees for any losses incurred by them as a result of these changes in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

## ORDER

The National Labor Relations Board orders that the Respondent, RFS Ecusta, Inc., Pisgah Forest, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide PACE International Union, AFL–CIO and its affiliated Local No. 1971 (collectively, the Union), as requested by letter dated July 3, 2003, the names, rates of pay, job classifications, and dates of recall or hire of all employees performing bargaining unit work; all of which information is relevant and necessary for the performance of its duties as the collective-bargaining representative of the Respondent's employees.

(b) Unilaterally changing the wages and benefits of its newly-hired and recalled employees without prior notice to the Union and without affording the Union an opportunity to bargain with regard to the changes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Furnish the Union with the requested information set forth above.

(b) Restore the status quo that existed just prior to its unilaterally changing wages and benefits for newly-hired and recalled employees in February 2003, until the Respondent bargains with the Union in good faith to an agreement or an impasse.[5]

(c) Make whole unit employees by paying them the wages and benefits due them since February 2003, with interest.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for

[4] The Board has held that social security numbers are not presumptively relevant to a union's duties as an exclusive collective-bargaining representative. Accordingly, in the absence of a showing here of their potential or probable relevance, we deny the Motion for Default Judgment with respect to the Respondent's failure to provide social security numbers, and remand that issue to the Region for further appropriate action. *Cheboygan Health Care Center*, 338 NLRB No. 115, slip op. at 2 fn. 2 (2003); *American Gem Sprinkler Co.*, 316 NLRB 102, 104 fn. 7 (1995); cf. *Hastings Industries*, 338 NLRB No. 124, slip op. at 2 fn. 2 (2003).

[5] Nothing in our Order, however, should be construed as authorizing or requiring the Respondent to cancel any wage increase and/or increase in benefits without a request from the Union.

good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Pisgah Forest, North Carolina, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since February 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 31, 2004

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| Robert J. Battista, | Chairman |
| Wilma B. Liebman, | Member |
| Dennis P. Walsh, | Member |

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to provide the Union, as it requested in July 2003, the names, rates of pay, job classifications, and dates of recall or hire of all employees performing bargaining unit work; all of which information is relevant and necessary for the performance of its duties as the collective-bargaining representative of the Respondent's employees.

WE WILL NOT unilaterally change the wages and benefits of our newly-hired and recalled employees without prior notice to the Union and without affording the Union an opportunity to bargain with regard to the changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL furnish the Union with the information requested as set forth above.

WE WILL restore the status quo that existed just before we unilaterally changed wages and benefits for newly-hired and recalled employees in February 2003, until we bargain with the Union in good faith to an agreement or an impasse.

WE WILL make whole unit employees by paying them the wages and benefits due them since February 2003, with interest.

RFS ECUSTA, INC.